palities from making even the most necessary public improvements.[16] In the recent case of *Jewell* v. *Nuhn* (Iowa 1915) 155 N. W. 174, the popular, instead of the technical meaning of the word was adopted. The court, after an exhaustive and able review of the authorities on the subject, decided that the amount embezzled by a share-holding secretary of a building and loan association constituted a debt to the association. Since the law will imply an assumpsit to repay the embezzled funds,[17] and since the amount thereof could be easily ascertained, the decision may be supported if one accepts the liberal construction of the word debt.

In view of the divergencies expressed by the cases, it would be futile to attempt to frame an all embracing definition of the word. Whether the court adopts the strict or the liberal interpretation seems to depend on all the circumstances involved. For instance, if the statute under consideration is penal in its nature, the word will be strictly interpreted.[18] On the other hand, if a constitution is involved, the courts are apt to avail themselves of the well known principle that such documents should be construed in their popular sense, and hence will adopt the liberal meaning of the word.[19] In some of the municipal debt cases, the courts are astute to learn whether the annual revenues are sufficient to cover the yearly liabilities arising from the contract, and where such appears to be the situation, the stricter view will be advanced, and the contract declared valid.[20] The intent of the legislature, as evidenced by the particular wording of the statute, will also be a determining factor.[21] Although the cases are greatly at variance, the general tendency seems to be toward the liberal interpretation of the word.

CONSTRUCTION OF REPUGNANT CLAUSES IN DEEDS UNDER MODERN DECISIONS.—The common law developed a number of rules, still of a certain degree of importance, which it applied to the interpretation of repugnant clauses in deeds. Of these rules, several have always been considered merely as rules of construction. Thus, it was held that the construction most beneficial to the grantee should be adopted.[1] Another was that the first of two repugnant clauses should prevail over the second,—an application of the old phrase that "the first deed

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[16]Read *v.* Atlantic City etc. (1887) 49 N. J. L. 558, 9 Atl. 759; but see s. c. (1888) 50 N. J. L. 665, 15 Atl. 10, where the court was evenly divided. Prince *v.* City of Quincy (1883) 105 Ill. 138; see Niles Water Works *v.* Mayor etc. of Niles (1886) 59 Mich. 311, 26 N. W. 525; Appeal of the City of Erie (1879) 91 Pa. 398.

[17]Admrs. of Dumond *v.* Carpenter (N. Y. 1808) 3 Johns, 183; Boardman *v.* Gore (1819) 15 Mass. 331; see Fagman *v.* Knox (1876) 66 N. Y. 525, 532.

[18]Cable *v.* McCune, *supra.*

[19]Epping *v.* City of Columbus, *supra.*

[20]City of Valparaiso *v.* Gardner, *supra*; see Appeal of the City of Erie, *supra.*

[21]See Melvin *v.* State, *supra*; Bolden *v.* Jensen, *supra*; Niles Water Works *v.* Mayor etc. of Niles, *supra*; Prince *v.* City of Quincy, *supra.*

[1]Esty *v.* Baker (1862) 50 Me. 325; Green Bay & Mississippi Canal Co. *v.* Hewett (1882) 55 Wis. 96, 12 N. W. 382.

and the last will shall operate".[2] It was further laid down that where inconsistent descriptions of the property conveyed appeared in the deed, the more specific description should be preferred to the more general,[3] and the more certain to the less certain.[4] But there was one rule which apparently did not remain a rule of construction, but developed into a rule of positive law.[5] This rule provided that the definition of the estate granted which appeared in the granting clause of the conveyance should prevail over conflicting definitions set forth in the recitals,[6] the habendum,[7] or the warranty clause[8] of the deed. Several reasons have been assigned for this result, of which the most common are, that the grantor could not, by some other clause in the deed, take away what he had already given by the granting clause;[9] and that the granting clause was an absolutely indispensable element of the deed, while the recitals and the habendum were not.[10]

In modern times, however, the courts have shown an increasing desire to lessen the strictness of the old rules. In effecting this, they have been greatly aided by the statutory provision found in many of the states, that a fee simple passes by a deed, although the word heirs is not used therein, unless a contrary intention appears. This provision has removed one great source of difficulty. For the courts in these states, following the common law rule that, where the estate was not defined in the granting clause, its definition in the habendum would be entirely proper,[11] have quite uniformly held that a clause subse-

[2]Green Bay, etc. Co. *v.* Hewett, *supra*; Winter *v.* Gorsuch (1878) 51 Md. 180. This rule, however, does not apply to two repugnant parts of the same granting clause. Zittle *v.* Weller (1884) 63 Md. 190; *cf.* Hess *v.* Kernen Bros. (Iowa 1914) 149 N. W. 847. It has been said that there is no rule that the first of two repugnant descriptions of the same property prevails. Rathbun *v.* Geer (1894) 64 Conn. 421, 30 Atl. 60.

[3]Guffey *v.* O'Reiley (1885) 88 Mo. 418; Pardee *v.* Johnston (1912) 70 W. Va. 347, 74 S. E. 721; *cf.* Sugg *v.* Town of Greenville (N. C. 1915) 86 S. E. 695.

[4]Esty *v.* Baker, *supra*; Melvin *v.* Proprietors of the Locks and Canals, etc. (1842) 46 Mass. 15, 27. A description by metes and bounds or subdivisions prevails over a description by quantity. Collinsville Granite Co. *v.* Phillips (1905) 123 Ga. 830, 841, 51 S. E. 666; see 16 Columbia Law Rev., 159.

[5]Johnson *v.* Barden (1912) 86 Vt. 19, 83 Atl. 721; *cf.* Wilkins *v.* Norman (1905) 139 N. C. 40, 51 S. E. 797.

[6]Dunbar *v.* Aldrich (1901) 79 Miss. 698, 31 So. 341; Dickson *v.* Van Hoose (1908) 157 Ala. 459, 47 So. 718; see Dickson *v.* Wildman (C. C. A. 1910) 183 Fed. 398. Probably because of the fact that this had become a rule of positive law, this rule prevailed over the rule that the first of two repugnant clauses should be adopted. This is apparent from the cases cited.

[7]Dickson *v.* Van Hoose, *supra*; Carllee *v.* Ellsberry (1907) 82 Ark. 209, 101 S. W. 407; Morton *v.* Babb (1911) 251 Ill. 488, 96 N. E. 279; Prindle *v.* Iowa Soldiers' Orphans' Home (1911) 153 Iowa 234, 133 N. W. 106; see Baldwin's Case (1589) 2 Rep. *23a. "The habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises." 2 Bl. Comm., *298.

[8]Jordan *v.* Neece (1892) 36 S. C. 295, 15 S. E. 202.

[9]See Dickson *v.* Wildman, *supra*; Triplett *v.* Williams (1908) 149 N. C. 394, 63 S. E. 79. This reasoning is obviously unsound, for there was no grant at all until the deed was completed and executed; and then all parts of the deed spoke at the same time. Johnson *v.* Barden, *supra*.

[10]Dickson *v.* Van Hoose, *supra*; Dickson *v.* Wildman, *supra*.

[11]Wager *v.* Wager (Pa. 1815) 1 Serg. & R. 374.

quent to the granting clause which limits the estate granted to less than a fee, creates no repugnancy, although the granting clause, standing alone, would have conveyed the fee.[12] The modern trend is further shown by the tendency to hold that the habendum may increase, not only the estate granted, but even the subject matter of the grant itself.[13] And especially do the courts appear anxious to find, in many cases, that there is in fact no repugnancy, where at common law there certainly would have been one.[14] An illustration of the present attitude of the courts is afforded by the recent case of *Kenner* v. *State* (Ark. 1915) 180 S. W. 492. In this case, the court construed a deed which in one clause stated that the grantors did thereby "grant, bargain, sell and convey" certain lands to the grantees, while a later clause in the deed provided that "it is understood that said property is to be used as a fish and game preserve only"; and a reservation was made of the right to cut timber. The court, disregarding technical rules, held that the deed clearly showed that the intention of the grantor was to convey merely a right to hunt and fish on the land, but not title thereto. This construction is clearly just and sound.

The obvious purpose of this relaxation of the common law rules is to effectuate the intention of the parties;[15] and in bringing about this result, the rule that the granting clause prevails over the rest of the deed has again been relegated to the rank of a mere rule of construction.[16] It is apparent, however, that cases will not infrequently arise, where, owing to the fact that it is impossible to discover from the deed which of two irreconcilably repugnant clauses represents the real intention of the parties, no opportunity is offered to the courts to apply any of these modifications of the common law principles. In such event, there is no alternative but to apply the strict rules.[17] As might naturally be expected, however, from the desire of the courts to mitigate the rigors of the common law rules, they are applied only as a last resort.[18]

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[12]This is true, whether the granting clause uses the word heirs, Barnett *v.* Barnett (1894) 104 Cal. 298, 37 Pac. 1049; Davidson v. Manson (1898) 146 Mo. 608, 48 S. W. 635; or not, Adams *v.* Merrill (1908) 45 Ind. App. 315, 87 N. E. 36; Graves *v.* Wheeler (1913) 180 Ala. 412, 61 So. 341; Buck *v.* Garber (1913) 261 Ill. 378, 103 N. E. 1059.

[13]Watuppa Reservoir Co. *v.* City of Fall River (1891) 154 Mass. 305, 28 N. E. 257; see Swazey *v.* Brooks (1861) 34 Vt. 451; *cf.* Rittenhouse *v.* Swango (1906) 30 Ky. L. Rep. 145, 97 S. W. 743; *contra*, Bessemer Irr. Ditch Co. *v.* Woolley (1904) 32 Colo. 437, 76 Pac. 1053; Union Water Power Co. *v.* Inhabitants of Lewiston (1906) 101 Me. 564, 579, 65 Atl. 67.

[14]See, for instance, Wilson *v.* Terry (1902) 130 Mich. 73, 89 N. W. 566; Midgett *v.* Meekins (1912) 160 N. C. 42, 75 S. E. 728; Wood *v.* Logue (1914) 167 Iowa 436, 149 N. W. 613. Cases still arise, however, where the common law rules appear to be strictly applied. See such cases as Dunbar *v.* Aldrich, *supra*; and Carllee *v.* Ellsberry, *supra*.

[15]Triplett *v.* Williams, *supra*; Sugg *v.* Town of Greenville, *supra*; Wood *v.* Logue, *supra*; Utter *v.* Sidman (1902) 170 Mo. 284, 70 S. W. 702; Culpeper National Bank *v.* Wrenn (1913) 115 Va. 55, 78 S. E. 620. Where it is possible to so construe all parts of the deed that they can stand together, the court must construe them in this way. Mount Olive Stave Co. *v.* Handford (1914) 112 Ark. 522, 166 S. W. 532.

[16]Johnson *v.* Barden, *supra*.

[17]Dickson *v.* Van Hoose, *supra*; Prindle *v.* Iowa Soldiers' Orphans' Home, *supra*; see Dickson *v.* Wildman, *supra*.

[18]Johnson *v.* Barden, *supra*; Wood *v.* Logue, *supra*; Putnam *v.* Pere Marquette R. R. (1913) 174 Mich. 246, 140 N. W. 554.